Supreme Court, U.S.
FILED
AUG 2 1991
OFFICE OF THE CLERK

(3)

No. 91-29

In The

Supreme Court of the United States

October Term, 1991

RAYMON J. MELTON,

Petitioner,

v.

CITY OF OKLAHOMA CITY, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The Petition for Writ of Certiorari should not be granted in that the in *banc* decision of the Tenth Circuit Court of Appeals was consistent with Rule 35 of the Rules of the Tenth Circuit and Rule 35 of the Rules of Appellate Procedure and did not deviate from the usual course of proceedings.

2. The Petition for Writ of Certiorari should not be granted in that "falsity" of the reason for termination is a *prima facie* element of a liberty interest and was argued by all parties. Further, the decision of the 10th Circuit Court of Appeals in *banc* on this issue was consistent with opinions of this Court and with opinions of the various circuits.

3. The Petition for Writ of Certiorari should not be granted in that Petitioner failed to establish that he was deprived of a liberty interest without due process.

4. The Petition for Writ of Certiorari should not be granted in that Petitioner had no protected property right.

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A. Gramling, Chief of Police for The City of Oklahoma City; Gerald L. Emmett, deceased, Former Assistant Chief of Police for The City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to The City Manager, Defendants.

Oklahoma Municipal League, Inc. amicus curiae.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, The City of Oklahoma City, Lloyd Gramling, Gerald Emmett, deceased, Marvin Maxwell, William Chambless, Robert Taylor and Paula Hearn respectfully pray that this Court deny Petitioner's Petition for Writ of Certiorari filed herein.

JURISDICTIONAL ISSUES

The Respondents received a copy of the Petition for Writ of Certiorari on July 5, 1991, and this brief in opposition is timely filed as provided by Rule 15.2 of the Rules of the Supreme Court of the United States.

Respondents question if the Petitioner's Petition for Writ of Certiorari is timely filed for two reasons. First, Petitioner was granted an extension to file a Petition for Writ of Certiorari to seek review of the opinion of the Tenth Circuit Court of Appeals in *banc* on Petitioner's liberty interest claim, under Rule 13.6 of the Supreme Court Rules. (See Paragraph No. 2 of Petitioner's Request for Extension of Time.) Petitioner's Petition contains an issue for which an extension was not granted, namely, was the notice given sufficient for a property interest, an issue decided by the panel and not reviewed by the in *banc* Court. (Issue No. 3.) Petitioner's failure to comply with the mandatory language of Rule 13.6 (the Application for Extension of Time . . . *must* identify the judgment sought to be reviewed . . .) should bar the review of the panel's decision on his alleged property interest.

Secondly, due to a change in the Supreme Court Rules, the denial of Respondents' Petition for rehearing but acceptance for in *banc* consideration may not have tolled the time period for commencing this appeal. Rule 13.4 of the Supreme Court Rules specifically provides:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States

> court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

In the instant case, Respondents' Petition for Rehearing was denied on November 3, 1989. Petitioner's Appendix at pages 50-53. However, the Tenth Circuit Court of Appeals accepted Respondents' Rule 35(b) suggestion to rehear the case in *banc*. Thus, Petitioner's time to file the instant petition may have commenced on November 4, 1989, the day after denial of the Rule 40 Petition for Rehearing and absent an extension, expired on February 1, 1990. This Petition was not filed until July 2, 1991. On March 19, 1991, the Circuit Court in *banc* entered judgment for Respondents on the liberty interest claim. However, 28 U.S.C. § 2101(c) requires a judgment to appeal from the case at bar. No judgment was entered until March 19, 1991. (Note: The Respondents filed a Petition for Rehearing and for suggestion on in *banc* which comes under the purview of both Rules 35 and 40 of the Tenth Circuit. The mandate was stayed even though the rehearing was denied. See Rule 41.2 of the Tenth Circuit Rules.) As noted in *Missouri v. Jenkins*, 491 U.S. 274 (1989), this is a complex area, and it has been brought to this Court's attention, as required by Rule 15 of the Supreme Court Rules. All the issues may, therefore, either be timely or untimely pursuant to Rule 13.4. Respondents admit that the application of this rule by this Court to bar a review of an in *banc* decision seems unfair. If this Court should hold that the added sentence of Rule 13.4 is not a bar for review of the in *banc* decision (which was only on the liberty issue), then, at least, Petitioner's third issue regarding the Tenth Circuit's panel's decision regarding

the property issue should be barred by the application of Rule 13.4 or Rule 13.6 of the Supreme Court Rules.

OTHER JURISDICTIONAL ISSUES:

Reversal By The Tenth Circuit In *Banc* Of The Liberty Interest

Petitioner states that the Tenth Circuit's in *banc* decision which reversed the trial court's judgment on his liberty interest deprivation claim deprived him of due process. He makes this allegation partially on the premises that he was not accorded an opportunity to adequately brief this matter prior to the circuit's decision in *banc* and attempts to allege surprise. He alleges that "it is a matter of fundamental fairness that the parties be afforded full notice and opportunity to address the matter." (Petitioner's Petition for Writ of Certiorari, page 12.) He requests that the Court issue a Writ of Certiorari alleging that the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's powers of supervision.

It was proper for the Tenth Circuit Court of Appeals in *banc* to review and reverse the liberty interest award based upon plain error and in accordance with Rule 35(c) of the Rules of the Tenth Circuit. This decision does not conflict with prior decisional law, as falsity is a *prima facie* element of an employment liberty interest claim. The in *banc* Court held that the instruction on the liberty interest was improper in several aspects, including the failure of Petitioner to prove stigmatization as defined by "falsity of the charges", and that the combination of all of the mistakes in the liberty instruction constituted plain error.

The Court further held that this error was unjust and prejudicial. Petitioner's Appendix at 16. Petitioner at page 12, footnote 15 of his Petition for Writ of Certiorari acknowledges that an Appellate Court may redress a plainly erroneous jury instruction even if an objection is not made at trial, citing *Zimmerman v. First Federal Savings and Loan Association*, 848 F.2d 1047, 1054, 1055 (10th Cir. 1988), (as did the Court in *banc*) "and cases cited therein." *Zimmerman*, in turn, cites as authority *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985) ("where an objection to an instruction is not made before the jury retires for deliberation, we only review an instruction that is 'patently plainly erroneous and prejudicial'"); and *Clegg v. Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975) (party claiming plain error has "heavy burden of demonstrating fundamental injustice").

Omission of a *prima facie* element of a claim, in this case "falsity" of the reason for termination, is patent plain error. *Codd v. Velger*, 429 U.S. 624 (1977). (It should be noted that both the in *banc* majority and dissent held the liberty instruction given in the trial of the case was erroneous). The consideration of the issues by the Court in *banc* was in accordance with judicial procedure and Petitioner was accorded due process. Due to the number of errors that the panel and the in *banc* judges held were committed by the trial judge, this Court should be convinced that fundamental injustice was committed in the trial of this case, all to the detriment of these Respondents. The Petitioner cannot legitimately allege that the issues raised by the in *banc* Court were inadequate to place him on notice or that he had no opportunity to be

heard on these issues with regards to the liberty interest question. His counsel filed briefs as scheduled on these issues and argued the questions before the circuit court in *banc*. The mere fact that the circuit court reversed the trial court's judgment does not show a departure from the usual course of judicial proceedings.

STATUTES INVOLVED IN THE CASE NOT CITED BY THE PETITIONER

Other than the Constitutional Amendment and the statute cited by Petitioner, Respondents believe this case also involves 11 O.S. § 50-125, which provides:

> Members retired under the provisions of this article may retain their status as peace officers of the State of Oklahoma, retired, and as such may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement. Such retired members may in times of great emergency or danger serve in keeping with their availability and ability at the request of the Governor of Oklahoma or the mayor of their retirement municipality.

Lastly, this case involves two sections of the Charter of The City of Oklahoma City, which provide:

> ARTICLE III.
>
> Section I. Appointments and Promotions.
>
> Appointments and promotions in the classified service of the City shall be made according to merit and fitness, and removal and demotions shall be made solely for the good of the service. To carry out this purpose, there is hereby created a Personnel Service Department, the head of which shall be the Personnel Director who

shall be appointed by the City Manager and is subject to removal by the Manager. . . .

ARTICLE IV.

Section 3. The City Manager. The City Manager shall:

(a) Be the Chief Administrative Officer of the City and shall have charge and supervision of all branches of the City service, except as otherwise in this Charter provided.

(b) See to the faithful execution of all laws and ordinances of the State and City.

(c) Appoint all officers and employees of The City of Oklahoma City except the elective officers and the officers whose election is vested in the Council by this Charter.

(d) Dismiss any officer or employee appointed by him whenever, in his judgment, the interests of the City service so require.

(e) Control, supervise and direct the several officers, boards, and departments of the City which are within and under his control and management.

(f) At any time investigate the affairs of any department. He, or any person appointed by him for that purpose, shall have power to compel the attendance of witnesses and the production of books, papers and other evidence.

(g) Attend all meetings of the Council and may take part in the discussions, but shall not vote.

(h) Keep the Council advised of all the needs of the City and shall recommend measures for adoption.

(i) Prepare and submit to the Council, annually during the month of July, an estimate in detail of

the probable receipts and the expenditures of funds and needs of the City in its operation for the ensuing fiscal year.

(j) Perform all such other duties as may be imposed on him by this Charter or by the Council.

STATEMENT OF THE CASE

MISTAKES IN FACTS IN PETITION FOR WRIT OF CERTIORARI

This case involves claims by a former police officer who, while employed by The City of Oklahoma City, surreptitiously tape recorded his conversation with an Assistant United States Attorney concerning his friend's criminal trial, for purely personal reasons, and then subsequently turned this tape recording to his friend's defense lawyers. After a complaint was filed, an investigation was conducted wherein Petitioner admitted the conduct. After notice and a hearing, an advisory board found this conduct violated the Police Code of Ethics and recommended termination. Instead, he was allowed to retire.

Petitioner artfully fails to inform the Court of several important dates and facts that occurred during and after the jury trial of Judge William Page and leading up to Petitioner's termination or retirement from The City.

Initially, Petitioner fails to inform the Court that the United States District Judge who was trying the Page criminal case held that Melton's information was not *Brady* material nor was it evidence of prosecutorial misconduct. Petitioner's Appendix 121-22 (Dissenting opinion of Judge Baldock). That determination in the criminal

case was upheld on appeal. *Page v. United States*, 808 F.2d 723 (10th Cir. 1987) *cert. denied* 482 U.S. 918 (1987).

Secondly, Petitioner fails to inform the Court that Lieutenant Smith's Internal Affairs notice letter was dated August 17, 1983, and received by Petitioner three weeks prior to the Departmental hearing. Petitioner's Appendix 4-5 and 75. During Lieutenant Smith's investigation into the FBI's allegations against Petitioner, Lieutenant Smith interviewed Petitioner and informed him of the charges and the name of the complaining witness. He further informed Petitioner, as Lieutenant Smith testified in the trial:

> Q. Did you in fact – but did you in fact discuss the allegation of perjury?
>
> A. I advised him in my judgment the most serious thing confronting Lt. Melton was the violation of the Code of Ethics in the fact that he – I don't know, we keep getting into this, that he tape recorded, but that's connected with what he did with it later. But his main problem was the fact that he recorded the conversation with United States Attorney Fredenburg and then made that tape available to the defense counsel for Judge Page. (TR page 684, lines 11-19.)

During this interview, Melton admitted to Lieutenant Smith that he had taped his conversation with the United States Attorney and turned it over to Page's defense counsel. (TR pages 686-687.)

Petitioner claims that Lieutenant Smith was to make a conclusion whether the evidence supported the allegations. However, under the Oklahoma City Police Department policy, the Departmental Review Board and not the

Internal Affairs Division was to make determinations as to whether complaints are "unfounded", "founded", "exonerated", etc. Oklahoma City Police Department Policy 9.01, Exhibit No. 53. The Board Chairman held the perjury allegation to be "mute" (sic) as the Board believed that the other charge was by far the most serious conduct.

At the Departmental Review Board hearing, Petitioner admitted he had taped this conversation and turned it over to defense counsel. (TR pages 233-234; 721.) He further admitted he knew it was wrong. (TR page 785.) At the trial of this case, Petitioner admitted that after taping this conversation he told his major he had had the conversation with the United States Attorney, but that he did not tell the major he had taped the conversation (TR page 228); that he did not tell the United States Attorney he felt compelled to produce to defense counsel the information he had (TR pages 255-256); and that he did not follow the normal procedures in turning over evidence (the tape) to defense counsel. (TR page 256.) These would appear to be actions of a person who knew that the taping and turning over was wrong.

Petitioner also asserts that he had no post-termination procedure. See pages 24-25 of the Petition. Yet, at footnote 10, page 9, of the Petition he states there were two methods of post-termination procedures available to him. One method was by the grievance procedure established through the contract between the Fraternal Order of Police and The City, and the second was by The City's Personnel Policies. Trial Counsel for the Respondents introduced evidence of these procedures in the trial. See

Testimony of P.D. Taylor (TR pages 587-597, particularly TR pages 591-592, 596) and testimony of Scott Johnson. (TR pages 936-937.) Petitioner testified he was aware of The City's grievance procedure and chose not to pursue it. (TR pages 237-238.) Petitioner's counsel continually objected to the introduction of evidence and to questions concerning the post-termination procedures. (TR pages 238-240.) The United States District Judge stated, in ruling on one of these objections:

> Q. After your termination, did you appeal it to any other body?
>
> A. Yes, sir.
>
> MR. HUGHES: Excuse me, your Honor. I object and request –
>
> THE COURT: I think that that's immaterial. He appealed it to this Court and it's before this jury now.
>
> MR. NAIFEH: Well, your Honor, there were procedures that are available to him that he may be –
>
> THE COURT: Well, he elected not to use them. He elected to come before a federal jury. And so that's good enough for this Court. (TR page 239, lines 2-13.)

Again, the Judge held at TR page 240, lines 4-25:

> Q. (by Mr. Naifeh) And where was that hearing? Who was that in front of?
>
> A. That was in front of the Executive Board of the Fraternal Order of Police.
>
> Q. And did you appear before that Board?
>
> A. Yes, sir, I did.

Q. Was that pursuant to your rights under you contract –

MR. HUGHES: Your Honor, may I have a continuing objection to this line of questioning?

THE COURT: Yes, and I don't think we need to pursue that any further. The Fraternal Order of Police was named as a defendant but I dismissed it out. So it's not before this jury.

MR. NAIFEH: Your Honor, may I approach the bench on this?

THE COURT: No, you may not. This jury is going to determine the facts here. I don't care what this Board here decided or the F.O.P. Board. This jury is going to decide this case.

MR. NAIFEH: I understand, your Honor. My questions are in regards to the process that he received.

THE COURT: Yes, and I said that it's immaterial, . . .

Petitioner also asserts that the press was never informed that the perjury charges were determined to be unfounded. The Tenth Circuit Court in *banc* found that Lieutenant McBride did tell several radio stations that:

> Just one? I'm sure that whoever covered that story. And I know KEBC covered it. I don't know who all else covered that story, but there were questions asked about the perjury allegation. And my response was those charges were found not to be, not to have happened, that it was a misunderstanding. I recall specifically talking to several members of the press about that. TR 621.

Petitioner's Appendix 10-11. The in *banc* Court further held that McBride's testimony recited above was not controverted. *Id.* The story quoted at page 7 of Petitioner's Petition states "the Internal Affairs investigation did not establish whether Melton perjured himself." The press, allegedly quoting McBride, was therefore telling the public that the perjury charge was not supported by the evidence.

Lastly, Petitioner at trial admitted:

> Q. Was there anything about that that he [McBride] stated that was untrue?
>
> A. No, sir. They were investigating me for everything in there . . . (lines 4-7.)
>
> Q. Are there any statements in there that Mr. McBride made that are untrue statements? [questioning about Plaintiff's Ex. 50].
>
> A. No, sir. They were investigating me for all the responses in the release of the news media. [TR 250, lines 20-23.]

SUMMARY OF ARGUMENT

Respondents contend that the decision of the Tenth Circuit Court of Appeals' in *banc* was correct on the liberty interest issue in that the jury instruction was fundamentally and fatally flawed in requiring the Petitioner to prove only stigmatization (without defining stigmatization) *or* foreclosure of (employment) opportunity, and that the Petitioner was not required to prove and, indeed, he failed to prove, that he had challenged the reason for his discharge as being false. The in *banc* decision was

consistent with decisions of this Court and with decisions of other Circuit Courts.

Respondents further contend that Petitioner had no property right under the City Charter of The City of Oklahoma City in continued employment, nor did he have a right to wear his uniform after termination or retirement. Lastly, even if Petitioner had a property or liberty right, the City provided him due process in connection with his termination.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THAT FALSITY OF THE REASON FOR TERMINATION IS A FUNDAMENTAL ELEMENT OF A LIBERTY INTEREST AND WAS ARGUED BY ALL PARTIES.

Petitioner includes only a portion of the Trial Court's instruction on the liberty issue. Cross-Petitioners' Appendix has reproduced this instruction in its entirety at pages 6-7.

Among all the other errors contained in this instruction, it does not require that the Plaintiff must challenge the reason for the termination as being false before a hearing is required, which is a necessary element of a *prima facie* liberty case. *Codd v. Velger*, 429 U.S. 624 (1977).

Respondents concede that trial counsel did not object to this instruction on the falsity element. Trial counsel did object to "charges" instead of "reasons" for the discharge. (TR page 1003.) Respondents assert that the omission of this falsity element is fundamental error. All Respondents, as did Petitioner, addressed the "falsity" issue on

appeal in all their Briefs filed in the appeal process. *e.g.*, the Brief in Chief of the City, Proposition No. V at pages 26-32, entitled "The Trial Court Committed Prejudicial Error on Fundamental Law in Instructing the Jury on the Liberty Interest of a Terminated Public Employee" which contains arguments on both "charges versus reasons for termination" and "falsity of the charge". *See also* the Brief in Chief of Defendant McBride at Proposition No. 1 entitled "The Actions of Defendant McBride Did Not Violate A Liberty Interest of the Plaintiff" at pages 17-27. Page 18 of this Brief argued that the Plaintiff has the burden of proving:

> (1) That his name and reputation was stigmatized and that the stigma was in connection with the discharge from employment. *Paul v. Davis*, 424 U.S. 693 (1976) . . .
>
> (2) The damage to reputation or name must imply a "stigma" which forecloses the employee's freedom to take advantage of other job opportunities. *Board of Regents v. Roth*, 408 U.S. 564 (1972) . . .
>
> (3) The plaintiff must prove the stigma arose from *substantially false characterizations* of the employee or his conduct. *Codd v. Velger*, 429 U.S. 624 (1977); *Bishop v. Wood*, 426 U.S. 341 (1974) . . .

The Petition for Rehearing argued at page 7 that falsity is a fundamental element of a liberty case. In their opening Brief in Response to Order For Rehearing En Banc, Respondents argued at pages 8 and 10 that the liberty jury instruction failed to define stigmatization and at page 5 that the stigmatization must be considered under the defamation test of *Paul v. Davis, supra*. In Proposition No. II of that same Brief, the Respondents argued that the

liberty instruction failed to instruct as to the falsity element and that this failure was plain error. In the Answer Brief to the Order on Rehearing at page 13, the Respondents quoted a portion of Justice Baldock's dissenting opinion (Petitioner's Appendix at 131):

> 'In a series of cases, the [Supreme] Court has held that for an employee to make a successful liberty deprivation claim she must show that her dismissal resulted in the *publication* of information which was *false and stigmatizing* – information which had the general effect of curtailing future freedom of choice or action (emphasis in original). Nevertheless, the court today erroneously holds that the police department's publication alone of perjury charges against Melton, subsequently dropped, impaired his "liberty interest in good name and reputation".' (citation omitted)

These Respondents have therefore argued that this instruction was erroneous, in that Petitioner was not required to show that he had challenged the reason for his termination or the press reports as being false. Petitioner was not deprived of due process by the in *banc* decision.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THAT PETITIONER FAILED TO ESTABLISH THAT HE WAS DEPRIVED OF A LIBERTY INTEREST WITHOUT DUE PROCESS.

Petitioner's liberty interest must fail for several reasons: he never challenged that the reason for his termination was false; he had a hearing prior to his termination; this hearing satisfied due process; the employer was not

solely responsible for publication; the publications attribute disclosure of defamatory reports of perjury to persons other than the employer; all statements actually issued by the employer were true; and the punitive action taken by the employer against the Petitioner had nothing to do with the reports of perjury.

A. ENTITLEMENT TO A HEARING.

In *Codd v. Velger*, 429 U.S. 624 (1977) at page 627, this Court stated:

> Assuming all of the other elements necessary to make out a claim of stigmatization under Roth and Bishop, the remedy mandated by the Due Process Clause of the Fourteenth Amendment is "an opportunity to refute the charge." 408 US at 573, 33 L Ed 2d 548, 92 S Ct 2701. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name," id., at 573 n 12. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.

Petitioner has never claimed that he did not tape record the United States Attorney and turn that tape over to the defense counsel in the criminal case. As the in *banc* court held, both parties were in agreement that the perjury charge was false. Petitioner's Appendix at 20. At page 25 of Petitioner's Appendix, the Tenth Circuit majority stated:

> In this case, there was no factual dispute between Mr. Melton and the defendants over the question of perjury. Indeed, the evidence is quite clear the defendants concluded at an early

> stage of the proceeding that the accusation arose from a "misunderstanding." It is a simple fact that the FBI accusation was neither considered relevant by the defendants in their decision to discipline Mr. Melton, nor a reason for his dismissal.

Lastly, on the issue of the perjury allegation, the Court stated at page 28 of Petitioner's Appendix:

> In structuring the parameters of constitutional guarantees, we must be mindful that our zeal for the protection of individual rights does not lead us to absurd conclusions. To hold here that the defendants were required to provide Mr. Melton with a hearing to clear his name from accusations neither made nor adopted by these defendants, or as seemingly suggested by the dissent, a name-clearing news conference, would be just such an absurdity.

Petitioner was not entitled to a name clearing hearing, in light of his admission of the conduct for which he was terminated. *Codd*, at 627.

Petitioner argues at pages 13-14 of his Petition that all that is required to have an entitlement to a name clearing hearing is that the nature of the charges be stigmatizing or deprive the employee of employment opportunities and that the charges be published. What Petitioner ignores is that prior to the requirement of a name clearing-hearing, the employee must deny the charges. *Codd*, at 627. This requirement is widely recognized among the Circuits. *See, e.g., Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990); *Doe v. Garrett*, 903 F.2d 1455, 1463 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1102 (1991); *Oklahoma Education*

Association v. Alcohol Beverage Laws Enforcement Commission, 889 F.2d 929, 936 (10th Cir. 1989); *Christian v. Belcher*, 888 F.2d 410, 416 (6th Cir. 1989); *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1215 (5th Cir. 1989); *Brady v. Gebbie*, 859 F.2d 1543, 1553 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989); *Stone v. University of Maryland Medical System*, 855 F.2d 167, 172 n.5 (4th Cir. 1988); *Clark v. Maurer*, 824 F.2d 565, 566 (7th Cir. 1987). Even the cases cited by Petitioner in his argument concerning liberty interests acknowledge this. *See, e.g., Brandt v. Board of Coop Educational Services*, 820 F.2d 41, 43 (2nd Cir. 1987) ("employee must allege that the charges are false" citing *Codd*; *Lyons v. Barrett*, 851 F.2d 406, 408 (D.C. Cir. 1988) ("[Plaintiff] denies the allegations of sexual harassment"); *McGhee v. Draper*, 564 F.2d 902, 906, 907, 910, (10th Cir. 1977); and *Cox v. Northern Virginia Transportation Commission*, 551 F.2d 555, 557 (4th Cir. 1976) ("Mrs. Cox was not responsible for these questionable practices".) Lastly, in *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74 (3rd Cir. 1989), the Third Circuit Court of Appeals stated at page 83:

> Accordingly, if the plaintiffs had alleged and proved in this case that they had not used drugs behind the Cobb Creek Park tennis courts or that they had substantial evidence to tender at a hearing in support of such an allegation, they, at least arguably, would have made out a stigmatization case under the Due Process Clause. However, as indicated by the above-quoted allegation from their complaint, plaintiffs claim only that the defendant's allegations were "unconfirmed and unsubstantiated," not that they were untrue.

When interviewed by Lieutenant Smith, Petitioner admitted that he secretly taped a conversation between himself and an Assistant United States Attorney in the Federal Courthouse in Oklahoma City, Oklahoma, and that he turned that tape over to the defense in an upcoming criminal prosecution. He further admitted this conduct at his hearing in front of the Departmental Review Board.

Petitioner's Petition is centered around the FBI's allegation that Petitioner committed perjury. The FBI, and not Respondents, made this allegation. Petitioner did not contest that fact. The uncontradicted evidence at trial of this case was that neither the Board members, the Chief of Police, nor the City Manager considered the unfounded perjury charge in recommending or terminating Melton's employment with The City. The conduct that he was terminated for (or more properly, allowed to retire for) was admitted by Melton. There was no factual dispute and therefore no hearing of any type was required.

B. TYPE OF HEARING

The Trial Judge instructed the jury that the Petitioner was entitled to a pretermination hearing complete with the rights of representation and cross-examination. The Respondents assert that this Court would not require a fully adversarial pretermination hearing. *Zinermon v. Burch*, 494 U.S. 113, (1990); *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985); and *Board of Regents v. Roth*, 408 U.S. 564 (1972). Other circuits have not required a full adversarial hearing. *See e.g., Brandt v. Board of Co-op Educational Services*, 820 F.2d 41 (2nd Cir. 1987); *Myrick v. City of Dallas*, 810 F.2d 1382, 1386 (5th Cir. 1987); *Doe v.*

Casey, 796 F.2d 1508 (D.C. Cir. 1986); and *Endicott v. Huddleston*, 644 F.2d 1208 (7th Cir. 1980). The Tenth Circuit has held both ways. Compare *Koerpel v. Heckler*, 797 F.2d 858, 869 (10th Cir. 1986) with *Walker v. United States*, 744 F.2d 67 (10th Cir. 1984).

In *Zinermon v. Burch*, 494 U.S. 113 at ___, 108 L.Ed.2d at 118 (1990), this Court stated:

> Burch argues that postdeprivation tort remedies are never constitutionally adequate for a deprivation of liberty, as opposed to property, so the Parratt rule cannot apply to this case. We, however, do not find support in precedent for a categorical distinction between a deprivation of liberty and one of property. See Lynch v. Household Finance Corp., 405 US 538, 552, 31 L Ed 2d 424, 92 S Ct 1113 (1972) ("the dichotomy between personal liberties and property rights is a false one"); Wolff, 418 US, at 557-558, 41 L Ed 2d 935, 94 S Ct 2963 (a hearing is generally required before final deprivation of property interests, and "a person's liberty is equally protected"). In Parratt itself, the Court said, 451 US, at 542, 68 L ED 2d 420, 101 S Ct 1908, that its analysis was "quite consistent with the approach taken" in Ingraham v. Wright, 430 US 651, 51 L Ed 2d 711, 97 S Ct 1401 (1977), a liberty interest case.

In an attempt to avoid this language, Petitioner adds as an issue that the procedure for the "property" deprivation was deficient. If not for this addition, this Court, consistent with *Zinermon v Burch*, would hold that if a procedure satisfies the *Loudermill* test for a property interest (which the panel held herein, *see* Petitioner's Appendix at 75), then such hearing would also satisfy a liberty interest. It was fundamental error to instruct that a liberty

interest hearing must be pretermination, and the employee has the rights to counsel and confrontation and cross-examination of witnesses.

C. THE USE OF THE DISJUNCTIVE

Instruction No. 7 allowed recovery for public dissemination of the charges . . . [if] those charges would stigmatize the employee's reputation or foreclose future employment opportunities. Cross-petitioner's Appendix at 8-9. This portion of Instruction Number 7 is incorrect as to when a liberty interest would be invoked pursuant to the Fourteenth Amendment of the United States Constitution, and thus permitted recovery when not authorized by decisional law of this Court. By instructing in the "disjunctive," the trial court permitted an alternate recovery for defamation alone, a recovery for a state-tort claim which was and is precluded by the holding in *Paul v. Davis*, 424 U.S. 693 (1976), and *Wulf v. City of Wichita*, 883 F.2d 842, 869 (10th Cir. 1989), and authority cited therein. Defamation alone, although occurring at the same time as termination, is not sufficient to create a cause of action for denial of liberty without due process, and accordingly does not rise to a civil rights action without the additional deprivation of future employment opportunities. The appropriate remedy for defamation is through state tort law, and the potent § 1983 remedies should be reserved to remedy constitutional violations. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

Instruction Number 7 permitted recovery by Plaintiff for foreclosure of future employment opportunities *without* a requirement of a stigmatization of Plaintiff's name and reputation. Such "instruction" was therefore contrary to the decisions of this Court in *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth, supra*; and *Codd v. Velger, supra*, and *Paul v. Davis, supra*.

D. DISSEMINATION OF CHARGES INSTEAD OF REASONS FOR TERMINATION

Instruction Number 7 identifies as an element of Melton's claim, that "(the) termination was accompanied by public dissemination of the charges against him." Cross-Petitioner's Appendix at 8-9. This portion of the instruction was inappropriate because the "charge of perjury" against Melton was raised by the FBI and reported and investigated by Respondents, but was not a reason for Melton's discharge. The FBI complaint filed with the Oklahoma City Police Department did include *allegations* of perjury. Respondents contend that the use of the term "charges" by the trial court in Instruction Number 7 is plain error since the charges or allegations of perjury were not those of Respondents, nor were they considered by Respondents in connection with Melton's termination. Counsel for Respondents did object to the charge versus reasons language (TR. page 1003). A public entity may not be liable for a liberty interest violation unless it creates and disseminates false and defamatory statements in connection with an adverse employment decision. *Codd v. Velger*, 429 U.S. at 628.

Additionally, the instruction of the court as to the first element of Melton's liberty claim, pertaining to "charges", and the second element, pertaining to "reasons for dismissal", coupled with the failure to define "stigma" created an ambiguous and abstruse charge to the jury, leaving the jury without meaningful direction as to the essential elements of Melton's claim. Further, plain error was committed on page 1 of the Instructions wherein the trial court, in essence, directed a verdict in Plaintiff's favor by charging: "Where the allegations are of a serious nature, such as *perjury or unethical conduct*," the Court mandated a due process hearing. This instruction was given without guidance as how the terms "charges," "allegations," and "reasons for his dismissal" fit within the elements of a liberty interest.

In *Board of Regents v. Roth, supra*, this Court suggested the need for a multi-dimensional liberty test, and in response the Seventh Circuit developed the following two-prong test:

> The concept of liberty recognizes two particular interests of a public employee: (1) the protection of his good name, reputation, honor and integrity, and (2) his freedom of other employment opportunities.

Lipp v. Board of Education, 470 F.2d 802, 805 (7th Cir. 1972).

The trial court committed plain error by substitutions of the term "charges" for "reasons for dismissal." This merger was not considered permissible in *Hadley v. County of DuPage*, 715 F.2d 1238, 1245-46 (7th Cir. 1983) *cert. denied*, 465 U.S. 1006 (1984), cited with approval in *Bailey v. Kirk*, 777 F.2d 567, 572 (10th Cir. 1985).

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THAT PETITIONER HAD NO PROTECTED PROPERTY RIGHT.

Petitioner asserts he had a continued interest in employment. See page 20 of the Petition. Property rights are defined by state law and not by Federal law. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The Court instructed the jury that the Oklahoma City Police Department manual and the Oklahoma City Policy and Procedures Manual were sufficient to give Plaintiff a legitimate expectation that his employment would continue absent a cause for discharge. See Instruction No. 6, Cross-Petitioners' Appendix at 6-7. The Charter of The City of Oklahoma City states at Article IV, Section 3:

> Section 3. The City Manager. The City Manager shall:
>
> d. Dismiss any officer or employee appointed by him whenever, in his judgment, the interests of The City so require.

This Charter also states at Article III, Section 1, "removals . . . shall be made solely for the good of the service". This Charter was introduced at Trial, contrary to the finding of the three-judge panel of the Tenth Circuit Court of Appeals. Petitioner's Appendix at 72-74 n 15. *See* Cross-Petitioners' Appendix at 12-14, 15. A similar provision has been interpreted by the Oklahoma Supreme Court as a terminable-at-will employee. *See Hall v. O'Keefe*, 617 P.2d 196 (Okla. 1980), and *Goodwin v. City of Oklahoma City*, 182 P.2d 762 (1947). The Charter is controlling in determining whether a City employee obtains a property interest in continuation of employment with The

City. See *Bailey v. Kirk*, 777 F.2d 567, 574 (10th Cir. 1985). Yet various panels of the Tenth Circuit Court of Appeals have held that a police employee of The City of Oklahoma City has no protected property interest in continued employment, *Graham v. City of Oklahoma City*, 859 F.2d 142 (10th Cir. 1988) or that if there is a property right, the City's procedures are sufficient due process. *Melton v. City of Oklahoma City*, Petitioner's Appendix at p. 75; *Meder v. City of Oklahoma City*, 869 F.2d 553 (10th Cir. 1989); and *Rosewitz v. Latting*, 689 F.2d 175 (10th Cir. 1982). Any policy, regulation or rule adopted by City Council resolution purporting to grant employees' rights could in no way affect the conditions of employment provided for by the Charter. *Umholtz v. City of Tulsa*, 565 P.2d 15, 21-22 (Okla. 1977). Petitioner had no property interest in continued employment with Respondent City. Not only did the Tenth Circuit panel erroneously hold that the Charter was not admitted at trial, they then took judicial notice of the Charter only for purposes of holding The City liable for the liberty violation. Further, the panel of the Tenth Circuit denied the individual Respondents qualified immunity. Petitioner's Appendix at 104-07.

Assuming that Petitioner had a property right, the procedure supplied to him satisfied *Loudermill*. As the panel held:

> Nearly one month before the disciplinary board was convened Mr. Melton was given written notice of the Internal Affairs investigation, the allegations against him, and the name of the party who made the allegations. Additionally, he was given five days' (three working days) written notice before the Review Board was actually convened. While this period may not

> have been as long as Mr. Melton desired, we believe that in this case it was adequate to prepare a defense in light of the earlier notice. (footnote omitted) (Petitioner's Appendix at 75.)

In *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), this Court stated at 546:

> The *tenured* public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.
>
> To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. (Citations omitted; emphasis added.)

(This Court did require that post-termination procedures be available.) Even if Petitioner was a tenured public employee (which in light of the City's Charter, he was not), the process supplied to him and the availability of post-termination procedures satisfied the requirements of *Loudermill*.

Petitioner, at footnote 28 of his Petition, alleges that the termination procedure was fatally flawed because Chief Gramling testified that he had already decided to discharge the Petitioner before the Disciplinary Review Board was conducted and their input would not have made a difference. Neither the trial nor the deposition testimony of Chief Gramling support the allegations contained in the footnote. Petitioner read into the record the deposition testimony of Chief Gramling where, in response to a hypothetical question, he stated that he probably would not have retained Petitioner on the force if the Review Board had recommended retention. The

hypothetical question omits the fact that the Review Board would have already found that Petitioner had violated the Code of Ethics prior to making any recommendation regarding Petitioner's future with the department. While the Chief may consider the Review Board's recommendations regarding appropriate discipline once it has made findings that a violation has occurred, he is not obligated to follow that recommendation. The Review Board did not recommend that the Petitioner be retained with the police department but voted to recommend that Petitioner be terminated. That recommendation was not followed by Chief Gramling in the strict sense because Petitioner was allowed to retire from the force rather than be terminated.

Contrary to the Petitioner's allegations, the Chief testified that he had not attempted to influence the selection of the Review Board members; that he had not discussed the Petitioner's case with the Review Board members prior to their hearing, that he had not attempted to influence them in their decision nor had he made any decision regarding what action should be taken against Petitioner prior to their decision. (TR. pages 871-873.) Further, the Chief testified that, had the Review Board determined that the charges against Petitioner were not sustained, the case would have been dropped at that point. (TR. page 874, lines 12-22.) The Chief testified that in the past he had always followed the Review Board's decision as to whether or not the allegations against a police officer were sustained. (TR. page 875, lines 14-17.)

The Chief submitted the Petitioner's case to an impartial Review Board composed of his peers, including

members of his police union, and followed the decision of that board with regards to whether the allegation against Petitioner was sustained. He also followed its recommendation as to what discipline was appropriate and agreed with that determination. There is nothing in the record to support Petitioner's allegations that the Chief had already decided to discharge Petitioner or that he was not impartial.

Additionally, Petitioner claims that he had a property right in representing himself as a retired officer and in carrying a firearm, under 11 O.S. § 50-125, which states:

> Members *retired* under the provisions of this article *may* retain their status as peace officers of the State of Oklahoma, retired, and as such *may* retain the right to keep and bear firearms *when approved by the officials of the municipality of retirement*. Such retired members may in times of great emergency or danger serve in keeping their availability and ability at the request of the Governor of Oklahoma or the mayor of their retirement municipality. (emphasis added)

This statute is permissive in several respects. The Oklahoma Supreme Court has never held that the statute is mandatory. Even if this Court has the jurisdiction to hear this issue, the panel's decision should be affirmed on the grounds that Petitioner had no property right in continued employment or that he received due process.

CONCLUSION

For reasons stated herein, Respondents would urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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